

# UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION I

J. F. KENNEDY FEDERAL BUILDING, BOSTON, MASSACHUSETTS 02203-2211

## MEMORANDUM

DATE: June 22, 1990

SUBJ: Conduct of the Agency's business; and communication with outside attorneys and parties in litigation

FROM: Paul G. Keough *Paul Keough*  
Deputy Regional Administrator

TO: Division and Office Directors  
Branch and Section Chiefs

I am attaching a copy of the Administrator's February 27, 1989 memorandum concerning conduct of the Agency's business. After reviewing it recently, I decided that it should be reissued since it contains important guidance which we all should follow.

Harley asked me to highlight in particular the matter of how we should handle communication with outside attorneys and communication with parties to matters in litigation.

I would ask you and your staff to observe the following rules:

1. When the Agency is involved in litigation or in an administrative process, all communication with outside parties and their attorneys should be through the assigned ORC attorney.

2. In addition to the above instances, whenever an outside person or company is represented by an attorney, all communication with the attorney should be through the assigned ORC attorney.

I believe that by following this approach we will provide for maximum protection of the Agency's interests.

cc: Julie Belaga  
ORC attorneys



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 27 1989

THE ADMINISTRATOR

MEMORANDUM FOR: All EPA Employees

SUBJECT: Conduct of the Agency's Business

I look forward to meeting and working with many of you as I take up my duties as Administrator of the Environmental Protection Agency.

Together, as a team, we must tackle some of the most pressing and vexing problems that confront our nation and, as we have become acutely aware in recent years, our planet. The very health and well-being of millions of people depend on the decisions we make and the effectiveness with which we pursue our mission. We at EPA, indeed the federal government, cannot alone do all that is necessary. We must continue to build strong working partnerships with state and local agencies, with citizens and public interest groups, with the environmental community, with business councils and trade and professional associations, with scientists, and with many others who have important roles to play in protecting public health and the environment.

My immediate predecessors, Lee Thomas and William Ruckelshaus, offered guidelines for EPA staff contacts with people outside the Agency, and I wish to affirm them. The success of our efforts at EPA directly depends on the trust of the public we serve. We must seek at all times to earn and maintain that trust, and we must conduct our business openly and fairly, responding as best we can to the needs of the people we serve. The guidelines below should maintain the fairness and openness of our procedures and thus strengthen public confidence in our decisions.



### General Principles

EPA must provide, in all its programs, for the fullest possible participation by the public in our decisionmaking. This requires not only that EPA staff remain open and accessible to those representing all points of view, but also that EPA employees responsible for decisions take affirmative steps to seek out the views of those who will be affected by the decisions. EPA will not accord privileged status to any special interest, nor accept any recommendation or proposal without careful, critical examination.

### Appointment Calendars

To keep the public fully informed of my contacts with interested parties, a copy of my appointment calendar for each week will be placed in the Office of Public Affairs, available to whomever is interested at the end of the week. The Deputy Administrator, and all Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors similarly shall make their appointment calendars available.

### Litigation and Formal Adjudication

EPA is engaged in a wide range of litigation, both enforcement and defensive in nature. All communication with parties in litigation must be through the attorneys assigned to the case. Program personnel who receive inquiries from parties in matters under litigation must immediately notify the assigned attorney, and refer the caller to that attorney.

Formal adjudications, such as pesticide cancellation proceedings, are governed by specific requirements concerning ex parte communications, which appear in the various EPA rules governing those proceedings. These rules are collected and available in the Office of the General Counsel, Room 537 West Tower. I will conduct myself in accordance with these rules, and I expect all EPA employees to do the same.

### Rulemaking Proceedings

In rulemaking proceedings under the Administrative Procedure Act, EPA employees must ensure that the basis for the Agency's decision appears in the public record. Therefore, be certain (1) that all written comments received from people outside the Agency (whether during or after the comment period) are entered in the public record for the rulemaking, and (2) that a memorandum summarizing any significant new factual data or information likely to affect the final decision received during a meeting or other conversations also is placed in the public record.



You are encouraged, consistent with statutory responsibilities, to reach as broadly as possible for views to assist you in arriving at final rules. You should do so, however, in a manner that ensures that final decisions are supported by the public record and the Agency's rationale is fully explained in the preamble to the final rule. This does not mean that you may not meet with one special interest group without inviting all other interest groups to the same meeting, although all such groups should have an equal opportunity to meet with EPA. It does mean, however, that any oral communication regarding significant new factual data or information affecting a rule, including a meeting with an interest group, should be summarized in writing and placed in the public record. In addition to these guidelines, procedures have been established with OMB to ensure that relevant material received by OMB from outside parties will be placed in the EPA public record.

#### Communications Generally

I am confident that I can rely on EPA staff to use common sense and good judgement in communicating with the public. The openness and integrity with which we deal with the public is essential to ensuring public trust in the Agency.

I firmly believe in developing and maintaining an effective communications capability. The Agency has taken important steps to strengthen these capabilities, and I want to see continuing emphasis on communications planning, including commitment by the programs and the regions of appropriate personnel and other resources to achieve this.

In dealing with the press, EPA staff should be open and accessible; none of our goals is well served by limiting contact with the press. Those who speak to the press should concern themselves only with their particular area of expertise. Please inform your Assistant Administrator's office and the EPA Press Office promptly about all such conversations with the press.

Finally, all communications materials, written and audio-visual, produced for public dissemination should be developed in coordination with the Office of Public Affairs, which is to assure they are done cost-effectively, done in-house or by outside contractors as warranted, and are consistent with EPA graphic standards and a number of OMB directives on such materials.



We have entered a new era in which I expect EPA to play a leading role in developing solutions to complex environmental problems and in strengthening our already firm commitment to achieving steady, tangible environmental progress. In my dealings with EPA staff to date, I have been thoroughly impressed with the professionalism and dedication of everyone. I find myself energized by the challenge ahead, and look forward to working with you all to improve the quality of our environment.

  
William K. Reilly





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 27 1989

THE ADMINISTRATOR

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You are encouraged, consistent with statutory responsibilities, to reach as broadly as possible for views to assist you in arriving at final rules. You should do so, however, in a manner that ensures that final decisions are supported by the public record and the Agency's rationale is fully explained in the preamble to the final rule. This does not mean that you may not meet with one special interest group without inviting all other interest groups to the same meeting, although all such groups should have an equal opportunity to meet with EPA. It does mean, however, that any oral communication regarding significant new factual data or information affecting a rule, including a meeting with an interest group, should be summarized in writing and placed in the public record. In addition to these guidelines, procedures have been established with OMB to ensure that relevant material received by OMB from outside parties will be placed in the EPA public record.

#### Communications Generally

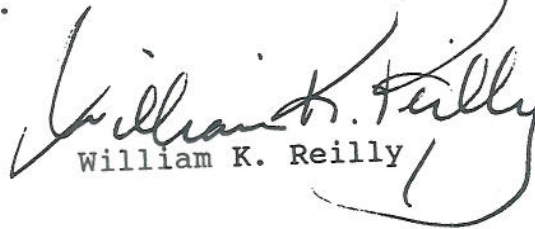
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I firmly believe in developing and maintaining an effective communications capability. The Agency has taken important steps to strengthen these capabilities, and I want to see continuing emphasis on communications planning, including commitment by the programs and the regions of appropriate personnel and other resources to achieve this.

In dealing with the press, EPA staff should be open and accessible; none of our goals is well served by limiting contact with the press. Those who speak to the press should concern themselves only with their particular area of expertise. Please inform your Assistant Administrator's office and the EPA Press Office promptly about all such conversations with the press.

Finally, all communications materials, written and audio-visual, produced for public dissemination should be developed in coordination with the Office of Public Affairs, which is to assure they are done cost-effectively, done in-house or by outside contractors as warranted, and are consistent with EPA graphic standards and a number of OMB directives on such materials.

We have entered a new era in which I expect EPA to play a leading role in developing solutions to complex environmental problems and in strengthening our already firm commitment to achieving steady, tangible environmental progress. In my dealings with EPA staff to date, I have been thoroughly impressed with the professionalism and dedication of everyone. I find myself energized by the challenge ahead, and look forward to working with you all to improve the quality of our environment.

  
William K. Reilly





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

May 19, 1983

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Contacts with Persons Outside the Agency

TO: All EPA Employees

When I recently appeared before the Senate Committee on Environment and Public Works, I promised that EPA would operate "in a fishbowl." I said, "We will attempt to communicate with everyone from the environmentalists to those we regulate and we will do so as openly as possible." Therefore, I believe it is important to set out for the guidance of all EPA employees a set of basic principles to guide our communications with the public.

In formulating these principles I considered more stringent restrictions on contacts with those outside the Agency than those described below. At my request, my staff met with staff members of the Administrative Conference of the United States to discuss these issues. This organization is an independent agency that develops improvements to the legal procedures by which Federal agencies administer their programs. Based on the recommendations of the staff members of the Administrative Conference and those of the Office of General Counsel, I am convinced that restrictions beyond those set out below would unnecessarily inhibit the free flow of information and views. In adopting these flexible procedures I am relying on EPA employees to use their common sense and good judgment to conduct themselves with the openness and integrity which alone can ensure public trust in the Agency.

General Principles

EPA will provide, in all its programs, for the fullest possible public participation in decision-making. This requires not only that EPA employees remain open and accessible to those representing all points of view, but also that EPA employees responsible for

decisions take affirmative steps to seek out the views of those who will be affected by the decisions. EPA will not accord privileged status to any special interest group, nor will it accept any recommendation without careful critical examination.

#### Appointment Calendars

In order to make the public fully aware of my contacts with interested persons, I have directed that a copy of my appointment calendar for each week be placed in the Office of Public Affairs and made available to the public at the end of the week. The Deputy Administrator, and all Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors shall make their appointment calendars available in a similar manner.

#### Litigation and Formal Adjudication

EPA is engaged in a wide range of litigation, both enforcement and defensive in nature. All communication with parties in litigation must be through the attorneys assigned to the case. Program personnel who receive inquiries from parties in matters under litigation should immediately notify the assigned attorney, and should refer the caller to that attorney. X

Formal adjudications, such as pesticide cancellation proceedings, are governed by specific requirements concerning ex parte communications, which appear in the various EPA rules governing those proceedings. These rules are collected and available in the Office of General Counsel, Room 545, West Tower. I will conduct myself in accordance with these rules, and I expect all EPA employees to do the same.

#### Rulemaking Proceedings

In either formal or informal rulemaking proceedings under the Administrative Procedure Act, EPA employees must ensure that the basis for the Agency's decision appears in the record. Therefore, be certain (1) that all written comments received from persons outside the Agency (whether during or after the comment period) are entered in the rulemaking docket, and (2) that a memorandum summarizing any significant new factual information or argument likely to affect the final decision received during a meeting or other conversations is placed in the rulemaking docket.



You are encouraged to reach out as broadly as possible for views to assist you in arriving at final rules. However, you should do so in a manner that ensures, as far as practicable, that final decisions are not taken on the basis of information or arguments which have not been disclosed to members of the public in a timely manner. This does not mean that you may not meet with one special interest group without inviting all other interest groups to the same meeting, although all such groups should have an equal opportunity to meet with EPA. It does mean, however, that any oral communication regarding significant new factual information or argument affecting a rule, including a meeting with an interest group, should be summarized in writing and placed in the rulemaking docket for the information of all members of the public.

A handwritten signature in dark ink, appearing to read "William D. Ruckelshaus". The signature is fluid and cursive, with the first name "William" and last name "Ruckelshaus" clearly distinguishable.

William D. Ruckelshaus



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

FEB 27 1989

THE ADMINISTRATOR

MEMORANDUM FOR: All EPA Employees

SUBJECT: Conduct of the Agency's Business

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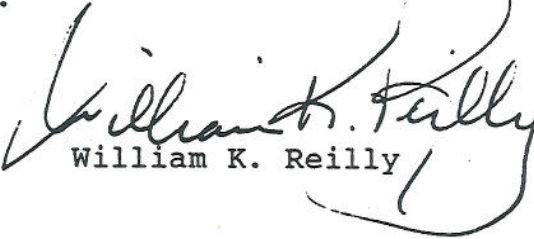
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William K. Reilly



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

1993

THE ADMINISTRATOR

**MEMORANDUM TO ALL EMPLOYEES**

**SUBJECT: Serving the Public Interest**

I am truly honored to have been selected to lead the Environmental Protection Agency. I believe that government service is a high calling and that EPA's potential to improve the lives of Americans is unparalleled. As I have met with many of you, I have learned that EPA employees share in that belief.

Among the most important of our challenges as public servants is our duty to live up to the public trust and confidence that sustains our work at EPA. As individuals and as an Agency, we must maintain the highest ethical standards in all our activities. This means conducting our business here openly, fairly and in accordance with all legal requirements.

In the tradition of recent Administrators, I am setting forth in this memorandum the guiding principles our Agency will use to ensure the integrity of all our actions. I ask each of you to join me in observing these principles.

General Principles

In all its programs, EPA must provide for the most extensive public participation possible in decision-making. This requires that we all remain open to all points of view and take affirmative steps to solicit input from those who will be affected by decisions. Our willingness to remain open to new ideas from our constituents, and to incorporate them where appropriate, is absolutely essential to the execution of our mission. At the same time, we must not accord privileged status to any special interest, nor accept any recommendation or proposal without careful, critical examination.

Appointment Calendars

To keep the public fully informed of my contacts with interested parties, I will make my appointment calendar for each week available in the Office of Public Affairs. I encourage the Deputy Administrator, all Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors to make their appointment calendars available as well.



## Litigation and Formal Adjudication

EPA is engaged in a wide range of both enforcement and defensive litigation. All pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case. Program personnel who receive inquiries from parties regarding matters under litigation must immediately notify the assigned attorney and refer the caller to that attorney.

Formal adjudications (e.g., pesticide cancellation proceedings) are governed by specific requirements concerning ex parte communications in the various EPA rules governing those proceedings. These rules are collected and available in the Office of the General Counsel, Room 537 West Tower. I will conduct myself in accordance with these rules, and I expect all EPA employees to do the same.

## Rulemaking Proceedings

In rulemaking proceedings under the Administrative Procedure Act, the basis for Agency decisions must appear in the public record. Therefore, after a rule is proposed, be certain that:

1. All written comments received from people outside the Agency (whether during or after the comment period) are entered in the public record for the rulemaking; and,
2. A brief memorandum summarizing any significant new data or information likely to affect the final decision that is received during a meeting or other conversation is placed in the public record.

These requirements are increasingly important as EPA continues to expand public involvement in our rulemaking efforts. I encourage you to solicit views from the broadest possible spectrum of interested parties in arriving at final rules. All interests should have an equal opportunity to meet with EPA. Meetings may be held with individual groups without involving all other interested parties. Of paramount importance, however, is ensuring any new data or information affecting the decision is promptly placed in the public record.

The Federal Advisory Committee Act (FACA) helps ensure that the Agency provides equal and open public access to the advice and recommendations EPA receives or solicits from outside parties. As many of you know, however, several exemptions are applicable. For example, when the Agency seeks the advice of individual meeting participants without seeking consensus, the gathering is not subject to FACA. This and other FACA exemptions may be helpful to you in obtaining a comprehensive response from interested entities during rulemakings while still meeting the letter and intent of FACA. Remember that questions about FACA's applicability and exemptions should be directed to the FACA experts in the Office of General Counsel's General and Information Law Division.

### Contacts with Congress and the Press

EPA staff should be open and accessible to Congressional staff and the press. I rely on you to use common sense and good judgement in these interactions. I ask that you inform your Assistant Administrator's office, the EPA Press Office, and/or the Office of Congressional and Legislative Affairs promptly about all such conversations with the press or Congressional staff. The consistency and integrity of our communications will enhance public trust in the Agency.

### Communications Generally

Finally, all communications materials produced for public dissemination should be developed in coordination with the Office of Communications, Education and Public Affairs. This will assure consistency with EPA standards and a number of OMB directives on such materials.

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Over the last few years, EPA has built an excellent reputation for involving the public, Congress, the press and other interested parties in our work. This openness to the public furthers our mission by increasing our credibility, improving our decision-making and developing broad public support for Agency initiatives. I am proud of the actions you are all taking to improve public access to and involvement in our work. I look forward to working with you to implement these guidelines and to continue to promote public involvement and ethical conduct in all EPA affairs. I believe our ability to remain open to the public and to make fair, well-informed decisions is essential to our success. I look forward to hearing any additional ideas you have on how we can achieve this goal.



Carol M. Browner





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 12 1987

MAY 31 1985

~~AUG 21 1987~~

THE ADMINISTRATOR

MEMORANDUM

TO: All EPA Employees

SUBJECT: Contacts With Persons Outside The Agency

I want to take this opportunity to reaffirm the guidelines established by former Administrator William D. Ruckelshaus concerning EPA contacts with persons outside of the Agency. The success of our efforts at EPA is directly dependent on the trust of the public we serve. To earn and maintain that trust, we must operate in an open manner, we must be responsive, and we must conduct our business in as fair a manner as possible. I believe that the guidelines set out below will serve to maintain the fairness and openness of our procedures and the public's confidence in our decisions.

General Principles

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Finally, in our dealing with the press, I would urge EPA employees also to be open and accessible. While it is important that those who speak to the press concern themselves only with their particular area of expertise, nothing is served by any program limiting contacts with the press. I ask that you inform your Assistant Administrator's office and the EPA Press Office about your official contacts with the press.

I know that I can rely on EPA employees to use common sense and good judgment in their dealing with the public. The openness and integrity in those dealings are essential to ensuring public trust in the Agency.



Lee M. Thomas

Key Points Re Implementation of 8/21/98 Herman Memo Re  
±Communication with Third Parties Regarding Enforcement Actions±

- Regional management is committed to full implementation of the Herman memo.
- Communications with members of Congress and Congressional staff and other outside parties regarding planned and pending enforcement actions are limited to publicly available information. These restrictions apply whether or not the outside party would be sympathetic to EPA±s position.
- Public information is generally viewed as including only information which is non-privileged and which would ordinarily be released to any member of the public, for example pursuant to a Freedom of Information Act request. Information concerning negotiation or litigation positions in planned or pending enforcement actions (which typically is withheld from disclosure pursuant to the deliberative process and/or ±enforcement confidential± exemptions to FOIA) is generally not considered public information. Any necessary briefings of outside parties regarding an enforcement action should be limited to this public information and should include Agency counsel.
- Whenever there is a planned or pending enforcement action, Agency counsel must be involved in communications with defendants or respondents, or interested third parties. As a practical matter, a brief conversation may be necessary to determine the nature of the party±s inquiry or concerns. Substantive discussions, however, must include counsel (except that counsel may establish separate channels of communication where appropriate±e.g. enforcement negotiations often include separate meetings of technical staff). must be is e channels.)
- EPA±s policy is that we do not negotiate the text of press releases with outside parties. While factual accuracy is critical in all press releases, this should be achieved by making inquiries to outside parties if necessary, rather than by sharing drafts of the press release. Any variance to this policy must be discussed by the case team, press officer, and appropriate enforcement manager.



**Scenario:** Counsel for defendant/respondent in an EPA enforcement action in which EPA is represented by counsel contacts senior EPA management to discuss how EPA staff is handling the matter and/or the positions they are taking in the matter.

**Key Issues/Considerations:** Two basic sets of issues arise from this scenario.

1) What are the Agency's expectations of the senior EPA official to whom this communication is directed?

The August 21, 1998 Herman memo ("Communications with Third Parties Regarding Enforcement Actions") and the various memos to which it refers provide the basic guidance for all EPA staff on this question. The Herman memo states that:

"Employees should not communicate with a defendant or respondent regarding a specific enforcement action, including matters that are in negotiation prior to referral or civil or administrative complaint, without close coordination with lead Agency counsel for the matter. In fact, any "pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case." Memorandum from the Administrator on Serving the Public Interest (August 6, 1993)"

Note that the Herman memo speaks to contact with any representative of the defendant or respondent, not just the attorney for the party. As a practical matter, whenever a senior EPA official receives a call from an outside party, that official may need to have a brief conversation with the caller to determine the nature of the party's concern and to allow for thorough follow-up internal inquiry. However, any subsequent substantive conversations of the matter with the outside party should be coordinated with Agency counsel.

2) What ethical obligations attach to the outside lawyer seeking to initiate this communication with an EPA official?

The ethical obligations of the outside lawyer may vary from jurisdiction to jurisdiction. The model ABA rule concerning communications with a person represented by counsel provides that:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Under ABA Formal Opinion 97-408 (August 2, 1997), which interprets the model ABA rule, represented government entities are generally protected from unconsented contacts by opposing counsel. However, such contacts are permitted with government officials who have authority to take or to address a policy issue, including settling the controversy, but only after providing government counsel with reasonable advance notice of his intent to communicate with such officials. If the jurisdiction in which the lawyer practices were to adopt this ABA opinion, a



communication as described above would constitute an ethical violation by the outside attorney if advance notice were not given to EPA counsel of the intention to initiate this contact with senior EPA management. It is not clear that any of the jurisdictions in New England have explicitly adopted the model ABA approach. The ethics rules for attorneys licensed in Washington D.C. do not require prior notice of contacts with Agency decision makers.

If such a communication does occur, a number of questions then arise as to whether and how this potential ethical violation should be addressed. Because the ethical standards govern the conduct of lawyers and are not intended to be enforced by or necessarily even familiar to non-lawyers, the senior EPA official to whom the communication is directed is not obligated to inform outside counsel that he or she may be violating an ethical standard. However, before the substance of such a communication begins, it may be a courtesy for the EPA official to provide some type of informal verbal notice to the attorney caller that ethical issues may be raised by the communication, such as "Have you given the lawyer at EPA who is handling this case a heads-up about this call? I think it would help avoid any question about whether we should be talking directly if we made sure that the EPA attorney on this case is involved."

More difficult is the question of how, if at all, such an ethical violation should be brought to the attention of whatever body is charged with enforcing the ethical standards for lawyers. As a practical matter, EPA counsel would likely consult with his or her management and provide an informal warning to outside counsel before any type of formal action is taken. If violations of the ethical standards were to persist, we would be faced with the question of who within our organization is authorized to initiate such a complaint and who within our organization should be consulted prior to initiating such a complaint. Given the infrequency with which such a situation is likely to arise, we are inclined not to try to answer these questions at this time, although we will advise the legal staff that they should discuss any matters raising this issue with their management.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION I  
ONE CONGRESS STREET SUITE 1100  
BOSTON, MASSACHUSETTS 02114-2023

**Memorandum**

**Date:** August 19, 1999

**From:** Joel Blumstein, Chief, Regulatory Legal Office, OES  
Tom Olivier, Senior Enforcement Counsel

*JB*  
*TO*

**To:** Mindy Lubber, Deputy Regional Administrator

**Subj:** Contacts with Persons Represented by Counsel

You have asked whether it is advisable and appropriate for EPA to issue formal actions such as information requests, administrative orders, or complaints directly to an entity known to be represented by counsel. As you know, it is OES's general practice to mail (or serve) formal actions directly to a regulated entity, rather than to its attorney, in order to provide timely and effective notice of EPA's action.

In essence, we issue formal actions directly to the responsible entity in order to satisfy statutory notice requirements and to ensure our actions are enforceable.<sup>1</sup> Where a statute provides EPA with the authority to issue orders, provide formal notice, or propose penalties against regulated entities, EPA should direct the action to the regulated entity itself, rather than to legal counsel. To do otherwise would invite arguments over whether and when an entity was properly served or notified, and impede our ability to take action against unresponsive companies or individuals.

In instances in which EPA already is engaged in discussions with entities represented by counsel, it is normal practice to provide a copy of any formal EPA action to counsel at the time it is mailed to their clients. This is certainly appropriate as a matter of fairness, courtesy, and efficient communication, but we don't see this practice as an acceptable substitute for service directly on the regulated entities. The exceptions would be matters

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<sup>1</sup> For example, Section 114 of the Clean Air Act provides that "the Administrator may require any person who owns or operates an emission source "to keep records, sample emissions, and provide information to EPA." "Person" is defined in Section 302 to include an individual, corporation, partnership, association, State, municipality, etc.

already in litigation, or where a company has formally designated an attorney as its agent for service of process.

With respect to ethical obligations, it is our view that direct service of EPA formal actions on regulated entities does not violate the rules of professional responsibility governing attorney communications with persons represented by counsel. One such provision is Massachusetts Rule of Professional Responsibility 4.2, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Although formal EPA actions are generally drafted by attorneys, they are issued by the RA or Division Directors with delegated authority under the applicable statutes; thus they are not communications by EPA lawyers on behalf of our clients. This interpretation is consistent with the comments to Massachusetts' Rule 4.2 and the ABA Model Rules of Professional Conduct Rule 4.2,<sup>2</sup> which clarify that "parties to a matter may communicate directly with each other ...." This is what the OES Division Director, for example, does in sending an information request to a regulated entity.<sup>3</sup>

And even if formal EPA notices and orders were considered attorney communications, there would be no clear violation of ethical standards. Massachusetts' Rule 4.2 expressly allows communications with a represented person where the lawyer "is authorized by law to do so." Because the communications in question (information requests, administrative orders, complaints) are authorized by our various statutes, an EPA attorney's role in formulating the communications would appear consistent with Rule 4.2.

Consistent with the above analysis is the provision for service of a complaint under EPA's Consolidated Rules of Practice, 40 C.F.R. § 22.5(b)(1): the "complainant" is required to serve a copy of an administrative complaint on the respondent or a

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<sup>2</sup> The ABA Model Rule 4.2 is almost identical to Massachusetts Rule 4.2.

<sup>3</sup> Although the rules of ethics recognize that parties may communicate directly with each other without attorneys, it is EPA policy that "pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case." Memorandum from Steven Herman, "Communication with Third Parties Regarding Enforcement Actions," August 21, 1988.



representative authorized to receive service on respondent's behalf (e.g. an agent for service of process). There is no requirement for service of the complaint on respondent's attorney, until the time the attorney is formally designated as the individual authorized to receive service relating to the proceeding. 40 C.F.R. § 22.5(c)(4).

If you have any questions or comments on these OES procedures, please call Joel Blumstein (8-1771) or Tom Olivier (8-1737).

cc: Ira Leighton  
Sam Silverman  
Ken Moraff



Message from the  
Administrator  
04/23/2009 01:41 PM

To All EPA Employees  
cc  
bcc  
Subject Transparency in EPA's Operations

Visit the Agency's Intranet for More Information

**EPA@Work**

All Hands Email-Archive

\*\*\*\*\*

This message is being sent to all EPA Employees.

Please do not reply to this mass mailing.

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## MEMORANDUM

**SUBJECT:** Transparency in EPA's Operations

**FROM:** Lisa P. Jackson  
Administrator

**TO:** All EPA Employees

In my testimony before the Senate Committee on Environment and Public Works and in my January 23, 2009, memorandum to all employees, I expressed my commitment to uphold the values of transparency and openness in conducting EPA operations. President Obama recently said in a memorandum to agency heads: "Transparency promotes accountability and provides information for citizens about what their Government is doing. Information maintained by the Federal Government is a national asset." I am asking each one of you to help me ensure EPA operates in full compliance with this principle.

The success of our environmental efforts depends on earning and maintaining the trust of the public we serve. The American people will not trust us to protect their health or their environment if they do not trust us to be transparent and inclusive in our decision-making. To earn this trust, we must conduct business with the public openly and fairly.

In 1983, then-Administrator William Ruckelshaus promised that under his leadership, EPA would operate "in a fishbowl." I wish to reaffirm this commitment and take the opportunity to provide guidelines about how we will ensure transparency in our interactions with all members of the public. These guidelines are intended to maintain the fairness and openness of our operations and thus strengthen public confidence in our decisions. I am relying on EPA employees to use their good judgment to conduct themselves with the openness and integrity that



alone can guarantee public trust in EPA.

### General Principles

In all its programs, EPA will provide for the fullest possible public participation in decision-making. This requires not only that EPA remain open and accessible to those representing all points of view, but also that EPA offices responsible for decisions take affirmative steps to solicit the views of those who will be affected by these decisions. This includes communities of color, Native Americans, people disproportionately impacted by pollution, small businesses, cities and towns working to meet their environmental responsibilities, and others who have been historically underrepresented in EPA decision-making. EPA will not accord privileged status to any special interest, nor will it accept any recommendation or proposal without careful, critical, and independent examination.

### Appointment Calendars

To keep the public fully informed of my contacts with interested persons, I have directed that a working copy of my appointment calendar, showing meetings with members of the public, be provided to the EPA Office of Public Affairs, where it will be available to the public each day on the EPA Web site. I also direct other senior Agency officials, including the Deputy Administrator, the Assistant Administrators, and the Regional Administrators, to make their working appointment calendars available to the public in a similar fashion.

### Freedom of Information Act Policy

As President Obama has stated, the Freedom of Information Act should be administered with a clear presumption that openness prevails. All Agency personnel should ensure that this principle of openness is applied to the extent possible when responding to a FOIA request. Managers should give their staffs and the Agency's FOIA professionals the support needed to satisfy FOIA's transparency requirement in as timely and efficient a manner as possible. In accordance with guidance issued by Attorney General Holder on March 19, 2009, EPA offices should exercise their discretion in favor of disclosing documents whenever possible under the FOIA. Offices should assert an exemption to disclosure only where the Agency reasonably foresees that disclosure would harm an interest protected by an exemption or disclosure is prohibited by law. Offices should also take steps to make information public on the Agency's Web site without waiting for a request from the public to do so. More detailed FOIA implementation procedures will be provided in the near future to assist you in carrying out this important government responsibility.

Because EPA is a public regulatory agency and employer to about 18,000 employees, EPA staff may come into possession of certain information that may need to be protected from disclosure under FOIA, including certain contract or business data, trade secrets, or personal privacy information. Although the Agency's business is to be conducted in an open and accountable manner, we must also ensure that information entitled to special protection is handled with the utmost care and in full compliance with all applicable laws and regulations.



Questions about whether special protections apply to certain information should be directed to the Office of General Counsel's General Law Office.

### Rulemaking Proceedings

Much of EPA's business is conducted through rulemaking. It is crucial that we apply the principles of transparency and openness to the rulemaking process. This can only occur if EPA clearly explains the basis for its decisions and the information considered by the Agency appears in the rulemaking record. Therefore, each EPA employee should ensure that all written comments regarding a proposed rule received from members of the public, including regulated entities and interested parties, are entered into the rulemaking docket.

Robust dialogue with the public enhances the quality of our decisions. EPA offices conducting rulemaking are therefore encouraged to reach out as broadly as possible for the views of interested parties. However, while EPA may and often should meet with groups and individuals, we should attempt, to the maximum extent practicable, to provide all interested persons with equal access to EPA. In addition, it is essential to ensure that the public receives timely notice, as far as practicable, of information or views that have influenced EPA's decisions. This means that EPA employees must summarize in writing and place in the rulemaking docket any oral communication during a meeting or telephone discussion with a member of the public or an interested group that contains significant new factual information regarding a proposed rule.

Questions about how to handle comments and other communications regarding a proposed rule should be directed to the appropriate program office personnel, attorneys in the Office of General Counsel, or regional staff working on the specific rulemaking.

I am committed to fulfilling President Obama's direction to agency heads to make use of tools and technology to increase outreach and interaction with the public. Public participation in Agency rulemaking proceedings may take a variety of forms, including public hearings and meetings, workshops, forums, focus groups, surveys, roundtables, Federal Register notice-and-comment procedures, advisory committee meetings, informal meetings with interested parties, internet-based dialogues, and other opportunities for informal dialogue, consistent with applicable legal requirements. I encourage our staff to be creative and innovative in the tools we use to engage the public in our decision-making.

### Litigation and Formal Adjudication

EPA is engaged in a wide range of litigation. The conduct of litigation by the Agency should reflect the principles of fairness and openness that apply to other EPA activities. However, we must also protect privileged litigation and enforcement-sensitive information from unauthorized disclosure. Communication with parties involved in litigation with EPA about that litigation should be through an attorney representing EPA in the case. Program personnel who receive inquiries about pending litigation from persons who are not parties to the litigation should consult with an attorney representing EPA in the case before responding. If you do not know which attorneys are representing EPA in a specific case, contact knowledgeable EPA



lawyers, including the Office of General Counsel, the Office of Enforcement and Compliance Assurance, or an Office of Regional Counsel, as appropriate.

Formal adjudications (including certain administrative penalty proceedings and pesticide cancellation proceedings) are also governed by specific requirements that limit communications between EPA staff and interested parties. These limitations appear in the various EPA rules governing those proceedings. Information about these rules is available from the Office of General Counsel and on the EPA Intranet.

#### Contacts with Congress and the Press

EPA often receives requests for records or information from Congress, i.e. the Speaker of the House, the President of the Senate, the Chair of a Committee or Subcommittee with jurisdiction over EPA. It also receives informal requests from individual members of Congress and their staffs. I recognize the importance of Congressional oversight and encourage our programs to provide Congress with the information necessary to satisfy its oversight and legislative interests to the extent possible and consistent with our Constitutional and statutory obligations. Information requests from Congress should be handled in consultation with managers of the affected EPA programs and our legislative affairs staff in the Office of Congressional and Intergovernmental Relations.

EPA also should be accessible to the press, which performs a vital role in informing the public about EPA's actions. As we respond to press inquiries, the EPA staff should respect our internal deliberative processes and strive for accuracy and integrity in our communications. This will ultimately enhance public trust in the Agency. When interacting with the press in the performance of your official duties, please coordinate with the managers of your program and media relations experts in the Office of Public Affairs.

Nothing contained in this memorandum interferes with your right to petition or to furnish information to Congress or a Member of Congress, as provided under applicable law, or to engage in protected whistleblowing activities.

#### Communications Generally

The Office of Public Affairs plays a central role in shaping the Agency's communications with the public. OPA will be providing further guidance on how our programs and regions should coordinate with it on the preparation of messaging materials and interactions with the press.

#### Conclusion

I have the utmost confidence in the ability of EPA's workforce to promote full public involvement and openness in all EPA affairs. I believe this will enhance the credibility of the Agency, boost public trust in our actions and improve the quality of our decisions. In short, we will let more sunlight into our Agency. I look forward to hearing any additional ideas you may

have on how we can achieve this goal.

As I continue to work with all of you, I plan to provide further thoughts on how we can strengthen EPA's public role in serving the needs of the public and advancing our environmental protection mission.





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

1993

THE ADMINISTRATOR

**MEMORANDUM TO ALL EMPLOYEES**

**SUBJECT: Serving the Public Interest**

I am truly honored to have been selected to lead the Environmental Protection Agency. I believe that government service is a high calling and that EPA's potential to improve the lives of Americans is unparalleled. As I have met with many of you, I have learned that EPA employees share in that belief.

Among the most important of our challenges as public servants is our duty to live up to the public trust and confidence that sustains our work at EPA. As individuals and as an Agency, we must maintain the highest ethical standards in all our activities. This means conducting our business here openly, fairly and in accordance with all legal requirements.

In the tradition of recent Administrators, I am setting forth in this memorandum the guiding principles our Agency will use to ensure the integrity of all our actions. I ask each of you to join me in observing these principles.

General Principles

In all its programs, EPA must provide for the most extensive public participation possible in decision-making. This requires that we all remain open to all points of view and take affirmative steps to solicit input from those who will be affected by decisions. Our willingness to remain open to new ideas from our constituents, and to incorporate them where appropriate, is absolutely essential to the execution of our mission. At the same time, we must not accord privileged status to any special interest, nor accept any recommendation or proposal without careful, critical examination.

Appointment Calendars

To keep the public fully informed of my contacts with interested parties, I will make my appointment calendar for each week available in the Office of Public Affairs. I encourage the Deputy Administrator, all Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors to make their appointment calendars available as well.



## Litigation and Formal Adjudication

EPA is engaged in a wide range of both enforcement and defensive litigation. All pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case. Program personnel who receive inquiries from parties regarding matters under litigation must immediately notify the assigned attorney and refer the caller to that attorney.

Formal adjudications (e.g., pesticide cancellation proceedings) are governed by specific requirements concerning ex parte communications in the various EPA rules governing those proceedings. These rules are collected and available in the Office of the General Counsel, Room 537 West Tower. I will conduct myself in accordance with these rules, and I expect all EPA employees to do the same.

## Rulemaking Proceedings

In rulemaking proceedings under the Administrative Procedure Act, the basis for Agency decisions must appear in the public record. Therefore, after a rule is proposed, be certain that:

1. All written comments received from people outside the Agency (whether during or after the comment period) are entered in the public record for the rulemaking; and,
2. A brief memorandum summarizing any significant new data or information likely to affect the final decision that is received during a meeting or other conversation is placed in the public record.

These requirements are increasingly important as EPA continues to expand public involvement in our rulemaking efforts. I encourage you to solicit views from the broadest possible spectrum of interested parties in arriving at final rules. All interests should have an equal opportunity to meet with EPA. Meetings may be held with individual groups without involving all other interested parties. Of paramount importance, however, is ensuring any new data or information affecting the decision is promptly placed in the public record.

The Federal Advisory Committee Act (FACA) helps ensure that the Agency provides equal and open public access to the advice and recommendations EPA receives or solicits from outside parties. As many of you know, however, several exemptions are applicable. For example, when the Agency seeks the advice of individual meeting participants without seeking consensus, the gathering is not subject to FACA. This and other FACA exemptions may be helpful to you in obtaining a comprehensive response from interested entities during rulemakings while still meeting the letter and intent of FACA. Remember that questions about FACA's applicability and exemptions should be directed to the FACA experts in the Office of General Counsel's General and Information Law Division.



### Contacts with Congress and the Press

EPA staff should be open and accessible to Congressional staff and the press. I rely on you to use common sense and good judgement in these interactions. I ask that you inform your Assistant Administrator's office, the EPA Press Office, and/or the Office of Congressional and Legislative Affairs promptly about all such conversations with the press or Congressional staff. The consistency and integrity of our communications will enhance public trust in the Agency.

### Communications Generally

Finally, all communications materials produced for public dissemination should be developed in coordination with the Office of Communications, Education and Public Affairs. This will assure consistency with EPA standards and a number of OMB directives on such materials.

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Over the last few years, EPA has built an excellent reputation for involving the public, Congress, the press and other interested parties in our work. This openness to the public furthers our mission by increasing our credibility, improving our decision-making and developing broad public support for Agency initiatives. I am proud of the actions you are all taking to improve public access to and involvement in our work. I look forward to working with you to implement these guidelines and to continue to promote public involvement and ethical conduct in all EPA affairs. I believe our ability to remain open to the public and to make fair, well-informed decisions is essential to our success. I look forward to hearing any additional ideas you have on how we can achieve this goal.



Carol M. Browner



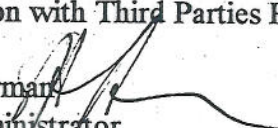
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

AUG 21 1998

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

SUBJECT: Communication with Third Parties Regarding Enforcement Actions

FROM: Steven A. Herman   
Assistant Administrator

TO: Regional Administrators  
Regional Counsel

This memorandum is to make certain that you are aware of Agency policies concerning communications about enforcement actions with defendants, respondents, or outside parties. Regional Counsels in particular are asked to ensure that all managers and staff are advised of these requirements and proceed accordingly.

Employees should not communicate with a defendant or respondent regarding a specific enforcement action, including matters that are in negotiation prior to civil referral or civil or administrative complaint, without close coordination with the lead Agency counsel for the matter. In fact, any "pertinent communication with parties in litigation must be conducted through the attorneys assigned to the case." Memorandum from the Administrator on Serving the Public Interest (August 6, 1993).

EPA Ethics Advisory 90-2 states that, "EPA employees must be careful not to disclose non-public information that will interfere with an investigation or litigation." Ethics Advisory 90-2, on Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation (October 26, 1990). This advisory requires that contacts by individual Members of Congress or their staff on, "matters which are under investigation, in pre-litigation, or in litigation," must be handled the same way as any outside communication with third parties. There may be rare instances where it is necessary to release information to Congress that is not privileged but which may be enforcement sensitive.<sup>1</sup> Such information should be made available

<sup>1</sup>Ethics Advisory 90-2 defines "Congress" as including the Speaker of the House, the President pro tempore of the Senate, and Chairs of Subcommittees or Committees.



only with the concurrence of the Assistant Administrator for the Office of Enforcement and Compliance Assurance and subject to such controls as may be required to ensure that confidentiality of the material or the investigation is not compromised. Of course, once a settlement is reached or a decision is obtained we must always be prepared to explain the result, respond to questions, and demonstrate that our action was fair and consistent with federal law.

The Department of Justice has taken the position that it will generally not provide information to Congress about ongoing investigations or negotiations. This policy is subject to extremely narrow exceptions for "unusual circumstances," e.g., where release of information is needed to assure the public that the matter is being investigated. Letter from Jamie Gorelick, then Deputy Attorney General, the Department of Justice to the Honorable Henry J. Hyde, Chairman of the House Judiciary Committee (March 16, 1995).

It continues to be against Agency policy to negotiate any terms of press releases with parties involved in Agency enforcement decisions. Memorandum from then-Deputy Administrator F. Henry Habicht on Press Release Policy (March 6, 1992).

Set forth below are several important points. Please note, however, that employees communicating with outside parties about specific enforcement actions should be familiar with all of the guidances, not just the points made below.

- ▶ Outside parties, including Members of Congress and their staff, should not attend settlement conferences or be present at meetings with defendants or respondents to discuss the status of enforcement actions. Nor should EPA employees share information about enforcement investigations, negotiations, litigation or settlement strategy or tactics with Members, their staff or other outside parties. In the interests of reaching a fair settlement (and consistent with the Executive Order on judicial actions), we often conduct negotiations prior to referral or the filing of a complaint. This process can work only where the confidentiality of such negotiations are respected.
- ▶ It may sometimes be necessary and appropriate to brief Members of Congress or their staff on the status of a pending case. In such instances, the briefing must be confined to information that is publicly available (e.g., information contained in a complaint), and care should be taken to note that our claims or allegations are not proven until the matter is settled or decided by a court of law. Such briefings should be coordinated through counsel for the case, who should be expected to attend. In keeping with current practice, the Department of Justice must also be consulted regarding any matter that is, or is likely to be, the subject of a referral.
- ▶ EPA employees should refrain from discussing sensitive information that was inadvertently leaked. The unauthorized release of sensitive information compromises the integrity of an enforcement action, is fundamentally unfair to defendants or respondents, and is grounds for disciplinary action. You should coordinate with counsel for the

enforcement action when distributing any public information (e.g., copies of the complaint) in response to requests from outside parties.

- ▶ If you receive a request from a Member of Congress or their staff for information about a specific enforcement case and you have questions about this memorandum or application of existing policies, please contact: Suzanne Childress at 564-2240 (Office of Regulatory Enforcement); Mary Adler at 564-2456 (Office of Criminal Enforcement, Forensic & Training); Karen Morley at 564-5132 (Office of Site Remediation Enforcement), and Mary Kay Lynch at 564-2574 (Office of Federal Facilities Enforcement).

I know you will give this memorandum and the attached guidance documents your personal attention, and assure that the Agency continues to meet the high standards for public service outlined in the Administrator's 1993 memorandum.

#### Attachments

cc: Assistant Administrators  
Scott Fulton, Acting General Counsel  
Joseph Crapa, Associate Administrator for Congressional & International Affairs  
OECA Office Directors  
Enforcement Division Directors  
Regional Enforcement Coordinators





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

1993

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Carol M. Browner

OFFICE OF  
GENERAL COUNSELEPA Ethics Advisory 90-2

SUBJECT: Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation

FROM: Gerald H. Yamada *Gerald H. Yamada*  
Deputy General Counsel  
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to discuss how EPA employees should deal with verbal and written inquiries from outside parties (especially attorneys) concerning EPA matters known to be in litigation, in pre-litigation stages (e.g., negotiation), or under investigation. Unlike litigation between individuals, where an attorney's communication with a party represented by counsel is strictly limited,<sup>1</sup> an attorney representing a party in litigation with the Agency may not be prohibited per se from communicating with the Agency,<sup>2</sup> depending on the jurisdiction.<sup>3</sup> Accordingly, EPA employees

<sup>1</sup> ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104; ABA Model Rules of Professional Conduct, Rule 4.2.

<sup>2</sup> ABA Model Rule 4.2 states that communications "authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about a matter." The Comments on the Rule state that opposing counsel are otherwise generally barred from communicating "with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization...or whose statement may constitute an admission...." See also Upjohn Co. v. United States, 449 U.S. 383 (1981).

<sup>3</sup> Rule 4.2 of new District of Columbia Bar Rules effective January 1, 1991, require only that attorneys "disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer."



must be alert to situations where opposing counsel seeks to communicate with EPA attorneys or officers or employees in the affected EPA program office about a matter under investigation or in litigation.

In addition to attorneys, outside parties may also include States or members of Congress, as well as the general public. Although EPA maintains a cooperative relationship with States, they may occasionally be adversaries in litigation. In addition, even where EPA could furnish such information to Congress itself,<sup>4</sup> inquiries from individual members of Congress or their staffs regarding matters which are under investigation, in pre-litigation stages or in litigation should be handled the same as any other outside communications.

When such communications occur, EPA employees must be careful not to disclose non-public information that will interfere with an investigation or litigation. Providing "expert opinions" and advisory interpretations in connection with such matters should also be avoided (unless such opinions and interpretations have been formally adopted by the Agency).

Communications concerning various types of matters should be handled as follows:

#### Federal Matters in Litigation

When a communication concerns a matter in litigation (either an enforcement action or defensive litigation), EPA employee's must coordinate any response with the lead EPA attorney for the matter. For defensive litigation, this attorney will be in the Office of General Counsel (OGC) or the Office of Regional Counsel (ORC); for enforcement matters, this attorney will be in the Office of Enforcement (OE) or the Office of Regional Counsel (ORC); for enforcement matters arising under Title II of the Clean Air Act, the lead attorney will be in the Office of Mobile Sources within the Office of Air and Radiation (OAR).<sup>5</sup>

When a case involving the Federal Government is before a court, the lead EPA attorney must consult with the Justice Department on the matter before providing any response.

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<sup>4</sup> The "Congress" includes the Speaker of the House, the President pro tempore of the Senate, and chairs of committees and subcommittees.

<sup>5</sup> OAR enforcement attorneys will either be in the Field Operations Support Division (FOSD) or Manufacturers Operation Division (MOD).





U. S. Department of Justice  
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

March 16, 1995

The Honorable Henry J. Hyde  
Chairman, Committee on the Judiciary  
U.S. House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

In October, 1993, my predecessor as Deputy Attorney General sent your predecessor as Chairman of the Judiciary Committee a letter setting forth the Department of Justice's policy and practice on communications between the Congress and the Department concerning pending Department investigations or civil or criminal cases, as well as applications for preclearance under the Voting Rights Act. I believe it is in the interest of both the Congress and the Department to restate that policy for the new Congress.

Initially, of course, there is a clear distinction between Congressional-Departmental contacts on case-specific pending matters, and contacts on general policy issues related to law enforcement and the administration of justice. On policy issues, the Department welcomes and encourages a spirited dialogue with the Legislative Branch, and we value a dialogue with individual Members in shaping such policy. The same is true with respect to nominations, legislation, appropriations and other matters not relating to litigation or investigations.

We also recognize that policy issues may occasionally arise in the context of individual matters pending before the Department. We believe that discussion of those issues, without reference to the individual matter at hand, can be both appropriate and beneficial to the policy formulation process. And there also may be occasions when Justice Department lawyers will need to be in contact with the Congress concerning specific investigations or cases, where, for example, we are defending the constitutionality of legislation, or where individual Members are fact witnesses.

With respect to Congressional contacts on pending matters on behalf of or regarding constituents or other identified parties, however, our policy has historically represented different



concerns. As with the Department's policy concerning White House contacts on pending matters, our goal is to insure that the administration of justice is free of political considerations and that it is correctly perceived to be totally apolitical. We want to avoid any possible misimpression that persons with unique access to the Department, such as Senators or Representatives, whether acting for themselves or for constituents, receive more favorable treatment or attention than persons without such access. That is an important reason behind our desire to insulate the Department, and particularly its line and supervising attorneys, from any situation that could be construed as an effort (however inadvertent or well-intended) to influence our case-specific actions.

To this end, we would discourage contacts concerning pending investigations or civil or criminal cases. And we would request that, where Members of Congress or their staff deem it essential to make inquiries concerning pending matters, such inquiries be directed only to the Attorney General, the Deputy Attorney General, the Associate Attorney General, or the Assistant Attorney General for Legislative Affairs. To the extent possible, we also would request that these inquiries be in writing, and that they state the extenuating circumstances that appear to warrant the inquiry.

We will, of course, respond promptly to such inquiries. In the vast majority of cases, however, such an inquiry would result in the Department simply following its long-standing policy of not discussing the facts of a pending matter or investigation with persons outside the Department, except, of course, with persons representing parties to such a matter or inquiry. Indeed, for the most part we will not be able to confirm or deny that any particular individual or entity is under investigation or what steps we intend to pursue in a pending matter. As you know, the reasons for this policy are to protect the privacy and reputations of presumptively innocent individuals and to promote the efficacy and success of our investigations and litigation.

The Department had made exceptions to this general policy by publicly acknowledging particular civil rights or anti-trust investigations. These exceptions were broadened slightly on January 14, 1993, by then Attorney General Barr's revision of a portion of the United States Attorney's Manual. The general rule remains that Department personnel shall not respond to questions about the existence of an ongoing investigation or comment on its progress, including such things as the issuance or serving of a subpoena, prior to the public filing of the document. However, the Manual now provides that in the "unusual circumstances" of "matters that have already received substantial publicity, or about which the community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the

public interest, safety, or welfare, comments about or confirmation of an ongoing investigation may need to be made."

In our view, the Department's policy is appropriate for a system in which investigations are often exceedingly complex, and where even the acknowledgement of an investigation, and particularly the identification of individual targets, can have dramatic adverse consequences for both the targets and third parties.

In light of these considerations, we would hope that in most cases Members of Congress would forbear from making case-specific inquiries. While no doubt well-intentioned, such inquiries have the potential for being misconstrued by the press and the public. Of course, even in the case of pending matters, the Department, through the Office of Legislative Affairs, will assist Members in obtaining access to public record information such as the procedural status of pending litigation.

We look forward to working with you and the Congress in providing information needed by Members, their constituents, and the legislative process, while faithfully carrying out the Department's responsibility for the evenhanded, impartial administration of justice.

Sincerely,

  
Jamie S. Gorelick





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

MAR 6 1996

OFFICE OF  
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Press Release Policy

TO: Assistant Administrators  
Associate Administrators  
Regional Administrators  
Regional Counsels  
Regional Public Affairs Directors  
Staff Office Directors

As we begin a new year, it is appropriate to review EPA's policy on press releases on regulatory decisions and enforcement agreements, and on the content of those announcements.

The central requirement in EPA press policy--never to be compromised--is factual accuracy. As a public agency we have an obligation to listen and be sensitive to the concerns of any stakeholders or members of the public that our statements be accurate and not create misimpressions. However, the specific content of press releases is an EPA internal matter at all times. The EPA policy does not permit EPA employees to negotiate in any way the Agency's option to issue press releases or the content or wording of press releases with parties outside of EPA, including those parties involved in settlements, consent decrees, or the regulatory process. As such, the content of press releases should be designed solely to disseminate pertinent information to the news media, and it is against EPA policy to negotiate any terms of press releases with parties involved in Agency enforcement actions or regulatory decisions.

I thank you for your cooperation in ensuring that the appropriate members of your staff are familiar and comply with this policy.

*F. Henry Habicht II*  
F. Henry Habicht II  
Deputy Administrator